

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

ROBERT TWYMAN, JR.

Petitioner,

VS.

Civil Action No. CV 07-S-1096-E

**WARDEN WILLIE THOMAS and
THE ATTORNEY GENERAL
FOR THE STATE OF ALABAMA,**

Respondents.

MEMORANDUM OPINION

This is a habeas corpus petition. On June 21, 2007, the magistrate judge entered a report and recommendation recommending that the action be dismissed to allow the petitioner to apply with the Eleventh Circuit Court of Appeals for permission to file a successive petition in this court.

Twyman filed objections to the report and recommendation on July 6, 2007.

In support of his objections, Twyman argues that:

Before filing the present Writ, on May 4, 2007, petitioner requested permission from the U. S. Court of Appeals for the Eleventh Circuit to file a second or succevice [sic] petition. On May 23, 2007, the Eleventh Circuit stated In Re; Robert Twyman, Jr., No. 07-12092-G; “Accordingly, Twyman’s application for leave to file a second or successive petition is hereby DENIED as unnecessary.”

The court has obtained a copy of the Eleventh Circuit Court of Appeals' ruling on Twyman's application for leave to file a second or successive habeas corpus petition.¹ The Eleventh Circuit concluded:

Because Twyman's previous § 2254 petitions were either dismissed without prejudice or were still pending at the time of this application, the current proposed § 2254 motion is not second or successive within the meaning of 28 U.S.C. § 2244(b). *See Dunn v. Singletary*, 168 F.3d 440, 441 (11th Cir. 1999)(holding that, when a first habeas petition is dismissed without prejudice, a later petition is not "second or successive" for purposes of § 2244(b)).

Accordingly, Twyman's application for leave to file a second or successive petition is hereby DENIED as unnecessary.

In the current petition, Twyman challenges his May, 1989, conviction for attempted assault in the first degree, in the Circuit Court of Talladega County. Twyman most recently challenged this same 1989 conviction and sentence in a petition for a writ of habeas corpus filed in this court on April 28, 2004. *Twyman v. Price, et al.*, CV-04-SLB-RRA-860-E. That petition was dismissed ***with prejudice*** on May 27, 2005, as barred by the statute of limitations. The Eleventh Circuit Court of Appeals denied Twyman's motion for a certificate of appealability on November 4, 2005, and denied his motion to reconsider his motion for a certificate of

¹ A copy of the petitioner's application for leave to file a second or successive habeas petition, and a copy of the Eleventh Circuit's ruling on that application are being attached to this memorandum opinion.

appealability on December 19, 2005. Moreover, according to court records, the instant case is the only case Twyman currently has pending before this court.

The appellate court's denial of Twyman's application for leave to file a second or successive habeas petition as unnecessary was based upon its understanding that "Twyman's previous § 2254 petitions were either dismissed without prejudice or were still pending at the time of this application." However, *Twyman v. Price, et al.*, CV-04-SLB-RRA-860-E, was clearly dismissed with prejudice, and Twyman has no other habeas petitions pending in this court.² Therefore, the current petition filed by Twyman is successive, and he has not obtained permission from the Eleventh Circuit Court of Appeals to file a successive petition in this court.

The court has considered the entire file in this action, including the report and recommendation and the petitioner's objections to the report and recommendation, and has reached an independent conclusion that the report and recommendation is due to be adopted and approved.

Accordingly, the court hereby adopts and approves the findings and recommendation of the magistrate judge as the findings and conclusions of the court. This habeas petition is due to be dismissed without prejudice, so the petitioner may

² Copies of the report and recommendation, memorandum opinion, and dismissal order in CV-04-SLB-RRA-860-E, and a copy of the printout of the petitioner's case history in this court are being attached to this memorandum opinion.

seek to obtain permission from the Eleventh Circuit Court of Appeals to file a successive petition in this court. An appropriate order will be entered.

Done this 19th day of July, 2007.

A handwritten signature in black ink, reading "Lynwood Smith". The signature is written in a cursive style with a large initial "L".

United States District Judge